



## KENTUCKY REGISTRY OF ELECTION FINANCE

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### ADVISORY OPINION 2010-001

Any Advisory Opinion rendered by the Registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the Advisory Opinion is required. KRS 121.135(4).

March 24, 2010

**VIA FACSIMILE – 859.255.6903**  
**AND FIRST CLASS U.S. MAIL**

Mr. D. Eric Lycan, Esq.  
Steptoe & Johnson  
1010 Monarch St., Suite 250  
P.O. Box 910810  
Lexington, KY 40591-0810

In re: Intent of Kentucky Chamber of Commerce, Inc. to Engage in Express Advocacy in 2010 Elections (AO 2010-001)

Dear Mr. Lycan:

By letter dated February 22, 2010, you requested an Advisory Opinion on behalf of the Kentucky Chamber of Commerce, Inc. ("Kentucky Chamber") and corporations that are members of the Kentucky Chamber. The Registry received your request on February 23, 2010. Your request was posted for public comment on February 26, 2010 in accordance with KRS 121.135(5)(a). No public comments were received.

You state that the Kentucky Chamber intends to make independent expenditures for express advocacy communications, not otherwise coordinated with campaigns and/or candidates, regarding Kentucky candidates regulated by the Registry in the 2010 election cycle. You contend that these express advocacy communications will be paid for from general treasury funds, which include

In re: Intent of Kentucky Chamber of Commerce, Inc. to Engage in Express Advocacy in  
2010 Elections (AO 2010-001)

donations made by for-profit and not-for-profit corporations that are members of the Kentucky Chamber. The communications will take several forms, including but not limited to voter guides, handbills, TV and radio broadcast ads, newspaper ads, direct mail, billboards, and Internet blogs. The communications will also include communications to employees, members, customers, and vendors advising of positions that candidates have taken related to the Kentucky Chamber's interests. You further state that your members, including for-profit and not-for-profit corporations, intend to make independent expenditures in their own names for express advocacy communications, not otherwise coordinated with campaigns and/or candidates, regarding candidates regulated by the Registry as described above.

Your request for an Advisory Opinion is premised on the United States Supreme Court's recent decision in *Citizens United v. FEC*, \_\_\_ U.S. \_\_\_, Slip Opinion No. 08-205 (January 21, 2010). In *Citizens United*, the Supreme Court struck down §203 of the Bipartisan Campaign Reform Act of 2002 (BCRA). In so doing, the Supreme Court held that the First Amendment to the United States Constitution applies to protect the right of a corporation to make independent expenditures from the corporation's general treasury funds to expressly advocate the election or defeat of candidates. *Citizens*, supra, 558 U.S. at \_\_\_ (slip. op., at 50). Inasmuch as §150 of the Kentucky Constitution prohibits corporations from aiding, assisting, or advancing any candidate for public office in Kentucky in any way whatsoever, the Supreme Court's decision invalidates Kentucky law, at least to the extent that corporations may now influence the nomination and election of candidates regulated by the Registry by making independent expenditures. The practical effect of this decision is to put corporations and labor unions on equal footing with individuals with respect to independent expenditures.

Your concerns are timely and appropriate. The Registry appreciates this opportunity to clarify the law looking forward to the 2010 election cycle in the wake of *Citizens United*.

Kentucky law defines independent expenditure to mean:

... (t)he expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation, or cooperation with any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them, and which is not made in concert with, or at the request or suggestion of any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them.

See KRS 121.015(12). An independent expenditure is distinguishable from a contribution to a candidate because, "(b)y definition, an independent expenditure is an act not within the control of the candidate." *Wilkinson v. Jones*, 876 F. Supp. 916, 927 (W.D. Ky. 1995). If there is any coordination, consultation, or cooperation with a candidate, slate of candidates, candidate campaign committee, or authorized person acting on behalf of the candidate, slate, or their agents, then what appears to be an independent expenditure is in reality an in-kind contribution. See KRS 121.015(6). To prove coordination requires more than showing a prior communication. There must be a showing that the campaign discussed the content, timing, place, nature or volume of communications to be made. *Martin v. Commonwealth*, 96 S.W.3d 38, 56 (Ky. 2003).

In re: Intent of Kentucky Chamber of Commerce, Inc. to Engage in Express Advocacy in  
2010 Elections (AO 2010-001)

KRS 121.150(1) provides that any person who makes an independent expenditure is required to file a report with the Registry when the expenditures **by that person** exceed five hundred dollars (\$500) in the aggregate in any one (1) election. The Registry has prescribed a form - Report of an Independent Expenditure (KREF 013 Revised 04/2005) - to implement KRS 121.150(1). See enclosed Report of an Independent Expenditure form (KREF 013 Revised 04/2005). See also 32 KAR 1:080.

While independent expenditures are more commonly made by individuals or permanent committees (PACs), an independent expenditure may also be made by a campaign committee. "Campaign committee" is defined in relevant part by KRS 121.015(3)(a) as "*... one (1) or more persons who receive contributions and make expenditures to support or oppose one (1) or more specific candidates or slates of candidates for nomination or election to any state, county, city, or district office.*" Emphasis added. Kentucky law contemplates that a person may organize a campaign committee that is not authorized by candidates, as KRS 121.210(4) states that "(c)ampaign committees not authorized by, or disavowed by the candidate, shall not include the name of the candidate as part of the committee's name and shall file the reports and statements with the registry as prescribed in KRS 121.180." A campaign committee registers using a "Political Committee Registration" form (KREF 010 Revised 05/2005). See enclosed. See also 32 KAR 1:050 §1. Registration of an unauthorized campaign committee applies where a person pools the funds of others into a single conduit to expressly advocate either in a single election or for particular candidate(s) without authorization by the candidate(s).

Kentucky's campaign finance law requires the identification of an advertising sponsor on communications that "expressly advocate the election or defeat of a clearly identified candidate" including communications that result from independent expenditures. See KRS 121.190(1) and 32 KAR 2:110. KRS 121.190(1) has survived constitutional challenge with the Sixth Circuit Court of Appeals recognizing that Kentucky has a substantial interest in notifying the public of the source of campaign expenditures. *Kentucky Right to Life v. Terry*, 108 F.3d 637, 648 (6<sup>th</sup> Cir. 1997), cert. denied, 522 U.S. 860 (1997).

With this statutory backdrop in mind, you specifically request an Advisory Opinion on the following questions, which are addressed separately below:

1. May the Kentucky Chamber make independent expenditures for uncoordinated express advocacy in relation to Kentucky candidates and/or elections?

Yes, the Kentucky Chamber may make independent expenditures from its general treasury funds, as approved by its governing body, for express advocacy communications not otherwise coordinated with campaigns and/or candidates. The requirements of KRS 121.190(1) regarding disclaimers and KRS 121.150(1) regarding disclosure must be observed for these expenditures. So long as the Kentucky Chamber's fundraising efforts do not include direct solicitations of funds for independent expenditures, or receipt of contributions earmarked by members or others for independent expenditure efforts, political committee registration will not be required.

If, however, the Kentucky Chamber intends to solicit or otherwise receive contributions with the understanding that the funds will be segregated, earmarked or otherwise "passed through" the Kentucky Chamber as an administrative conduit to fund express advocacy communications, effectively shielding the contributors from public disclosure, then the Kentucky Chamber must

In re: Intent of Kentucky Chamber of Commerce, Inc. to Engage in Express Advocacy in  
2010 Elections (AO 2010-001)

register as a campaign committee and report these activities periodically pursuant to KRS 121.170 and KRS 121.180, in addition to filing independent expenditure reports where required by KRS 121.150(1). This is the same treatment that an individual would receive in the event that several individuals aggregated funds to make independent expenditures.

Disclosure as a campaign committee not authorized by a candidate under the above-described pass-through scenario provides a means to verify that no coordination with a candidate's campaign occurred and prevents persons from anonymously engaging in express advocacy. In the words of the United States Supreme Court, "The First Amendment protects political speech; and disclosure permits citizens and shareholders to reach to the speech of corporate entities in a proper way." *Citizens*, supra, 558 U.S. at \_\_\_\_ (slip. op., at 55). In the scenario where a corporation registers as an unauthorized campaign committee for the sole purpose of making independent expenditures, contribution limits would not apply, as the result in that circumstance would be an indirect limit on expenditures for independent political speech that would not withstand First Amendment scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 52 (1976).

2. May non-profit corporations that are members of the Kentucky Chamber, including those that accept donations from for-profit corporations, make uncoordinated independent expenditures for express advocacy in relation to Kentucky candidates and/or elections?

Non-profit corporations are subject to rules and regulations of the Internal Revenue Service that may, in some cases, limit political activity by these entities; however, these are rules that the Registry has no jurisdiction to interpret or enforce. For purposes of enforcing Kentucky's campaign finance laws, the same rules outlined above for the Kentucky Chamber also apply to non-profit corporations that are members of the Kentucky Chamber.

3. May for-profit corporations that are members of the Kentucky Chamber make uncoordinated independent expenditures for express advocacy in relation to Kentucky candidates and/or elections?

Here again, for purposes of enforcing Kentucky's campaign finance laws, the same rules outlined above for the Kentucky Chamber also apply to for-profit corporations that are members of the Kentucky Chamber.

While the present Report of an Independent Expenditure form (see enclosed) was clearly designed for individuals, KRS 121.150(1) grants the Registry the authority to approve a format for submitting a report of an independent expenditure that will accommodate independent expenditures by a corporation. The current form is adaptable for this purpose (and has long been used by permanent committees), and will be accepted until such time as the Registry promulgates an administrative regulation revising the existing form to reflect the current state of the law.

These requirements promote transparency in the conduct of election campaigns and are designed to prevent a situation where a person (whether an individual or a corporation) may seek to use another association or organization as a front to engage in anonymous express advocacy communications, which the First Amendment does not support. "While the right to publish anonymous material may exist to some degree, it does not seem altogether naive to assume that a fundamental objective of the First Amendment was to obviate the necessity for anonymity."

Page 5

Mr. D. Eric Lycan, Esq.

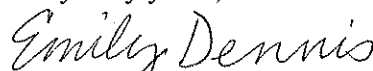
March 24, 2010

In re: Intent of Kentucky Chamber of Commerce, Inc. to Engage in Express Advocacy in  
2010 Elections (AO 2010-001)

*Morefield v. Moore*, 540 S.W.2d 873, 874-875 (1976). Disclosure promotes honesty and fairness in the conduct of election campaigns, which are legitimate purposes. Disclosure is a "less restrictive alternative to more comprehensive regulations of free speech." *Citizens*, supra, 558 U.S. at \_\_\_ (slip op., at 53); see also *Federal Election Comm'n. v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986). In addition, disclaimer requirements recognize that not only does the government have an interest in ensuring that voters are fully informed, but the public also has an interest in knowing who is speaking about a candidate. *Citizens*, supra, 558 U.S. at \_\_\_ (slip op., at 52-54); see also *Buckley v. Valeo*, 424 U.S. at 76. The parameters as outlined above place corporations and individuals on equal footing in compliance with the recent Supreme Court decision, while preserving the strong disclosure functions of KRS Chapter 121.

Please keep in mind that this Advisory Opinion is based on the specific facts set forth in your written request and does not cover past conduct. If you have any questions concerning this Advisory Opinion, please do not hesitate to contact the Registry. Thank you.

Very truly yours,



EMILY DENNIS

General Counsel

Enclosures

Cc: Registry Board Members  
Sarah M. Jackson, Executive Director

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140 Walnut Street, Frankfort, KY 40601-3240

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REGISTRY USE

**REPORT OF AN INDEPENDENT EXPENDITURE**

**NOTE: KRS 121.015(12) provides as follows: "Independent expenditure' means the expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation, or cooperation with any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them, and which is not made in concert with, or at the request or suggestion of any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them."**

An independent expenditure must be reported when it exceeds \$500 in the aggregate in one election. (KRS 121.150(1))

Your Name and Address _____ _____ _____		Your Occupation and Employer _____ _____		
Daytime Phone Number _____		Spouse's Name _____		
		Spouse's Occupation _____		
		Spouse's Employer _____		
Name of Candidate/Slate of Candidates/Committee		Office Sought _____ Supported _____ Opposed		
Constitutional Amendment		Election _____ Supported _____ Opposed		
Date	To Whom Made	Address	Purpose	Amount

I certify that this report was prepared with all reasonable diligence and is true, correct, and complete. I further certify that this expenditure was made in accordance with KRS 121.015(12).

Date \_\_\_\_\_

Signature \_\_\_\_\_

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**REGISTRY USE**

Date Received

Date Approved

**POLITICAL COMMITTEE REGISTRATION**

Please type or print

**Committee Name** - Do not include candidate's name in committee name unless authorized by candidate. (KRS 121.210(4)). Acronyms are permitted but full title from which derived must be shown. (KRS 121.170).

Mailing address (including city, state and zip)

Daytime Telephone Number

State the name of sponsor, the specific source of funds and the purpose for which this committee is being registered. (Permanent committees must list the major business, social, or political interest represented.)

Date committee plans to be active:  
(Committees with on-going activity  
use "Indefinite")

FROM: \_\_\_\_/\_\_\_\_/\_\_\_\_

THROUGH: \_\_\_\_/\_\_\_\_/\_\_\_\_

This committee is being organized as a: (check one)

- ☐ **CAMPAIGN COMMITTEE** (for a candidate during an election campaign) - KRS 121.015(3)(a).
- ☐ **CAUCUS CAMPAIGN COMMITTEE** - KRS 121.015(3)(b).
- ☐ **POLITICAL ISSUES COMMITTEE** (for an issue which will appear on the ballot) - KRS 121.015(3)(c).
- ☐ **PERMANENT COMMITTEE** (a permanent organization which functions on a regular basis) - KRS 121.015(3)(d).

**NOTE:** The chairperson and the treasurer of a committee shall be separate persons - KRS 121.170(4)

**CHAIRPERSON INFORMATION:**

Daytime Telephone Number: (\_\_\_\_)\_\_\_\_-\_\_\_\_

Home Telephone Number: (\_\_\_\_)\_\_\_\_-\_\_\_\_

E-mail Address: \_\_\_\_\_

Name \_\_\_\_\_

Mailing address (including city, state and zip) \_\_\_\_\_

**TREASURER INFORMATION:**

Daytime Telephone Number: (\_\_\_\_)\_\_\_\_-\_\_\_\_

Home Telephone Number: (\_\_\_\_)\_\_\_\_-\_\_\_\_

E-mail Address: \_\_\_\_\_

Name \_\_\_\_\_

Mailing address (including city, state and zip) \_\_\_\_\_

**CUSTODIAN OF FINANCIAL RECORDS INFORMATION:**

(if other than treasurer)

Daytime Telephone Number: (\_\_\_\_)\_\_\_\_-\_\_\_\_

Home Telephone Number: (\_\_\_\_)\_\_\_\_-\_\_\_\_

E-mail Address: \_\_\_\_\_

Name \_\_\_\_\_

Mailing address (including city, state and zip) \_\_\_\_\_

Candidate to be supported by committee:

Mailing Address (Including city, state and zip)	Office Sought
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Has the candidate approved the use of his name? ☐ YES (See Candidate's Authorization Box at bottom) ☐ NO

Constitutional amendment or public question to be advocated or opposed - KRS 121.015(3)(c)

This committee ☐ **Supports** or ☐ **Opposes** the above listed consitutional amendment or public question.

Primary Depository - Designate depository bank or financial institution in which the committee will maintain its funds.

Mailing Address (Including city, state and zip)

We, the undersigned, state we are the Chairperson and Treasurer of the above described committee and this Political Committee Registration is true, correct and complete.

Signature of Treasurer \_\_\_\_\_ Date \_\_\_\_\_

I, \_\_\_\_\_, hereby agree to the above statement and authorize the  
                     *Print Candidate's Name*  
 use of my name by this committee.

Signature of Candidate \_\_\_\_\_ Date \_\_\_\_\_